IP 04-1097-C M/K City of Indpls v Ace Insurance
Judge Larry J. McKinney Signed on 9/20/04

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CONSOLIDATED CITY OF INDIANAPOLIS,	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01097-LJM-TAB
ACE INSURANCE COMPANY OF NORTH AMERICA, CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY, BANKER'S STANDARD INSURANCE COMPANY,	)	
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CONSOLIDATED CITY OF INDIANAPOLIS, Plaintiff,	)	
vs.	)	1:04-cv-1097-LJM-TAB
ACE INSURANCE COMPANY OF NORTH AMERICA, d/b/a and/or Successors in Interest to CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY, ACE INSURANCE COMPANY OF NORTH AMERICA, d/b/a and/or Successors in Interest to BANKER'S STANDARD INSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY, Defendants.	)	

ORDER ON DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant's, Ace Insurance Company of North America ("Ace"), Motion to Dismiss the claims of Plaintiff, Consolidated City of Indianapolis ("the City"). The City seeks a declaration that Ace is obligated to indemnify Fluor Daniel, an insured, pursuant to the terms and conditions of Ace's policies with the insured. In the instant motion, Defendant seeks dismissal of all of the City's claims. For the reasons set forth below, the Court **GRANTS** the motion and the cause is dismissed without prejudice.

I. BACKGROUND

For purposes of this motion, the Court accepts the following well-pleaded factual allegations from

the complaint as true. The City contracted with a company named Fluor Daniel for environmental consulting services concerning a property the City considered purchasing. Comp. ¶ 8. Following testing, Fluor Daniel reported to the City that the property was clean. Relying on the test results provided by Flour Daniel, the City made a purchase offer and later acquired the property by a condemnation action when an agreement as to purchase price could not be reached. Comp ¶ 9.

After acquiring the property, the City commenced excavation activities that revealed a layer of asbestos, misidentified by Fluor Daniel during its testing of the site. Comp. ¶ 10. As a result, the City incurred significant delays and costs in developing the property. Comp. ¶ 11. On or about August 27, 2001, the City filed a Complaint for Damages against Flour Daniel and its successors in interest for breach of contract, professional negligence, and constructive fraud ("underlying action"). Comp. ¶ 12. On or about January 28, 2002, Fluor Daniel and its successors in interest filed for bankruptcy. Comp. ¶ 13.

During the time Fluor Daniel performed environmental consulting services for the City concerning the property at issue, it had insurance policies providing coverage for the causes of action that form the basis of the City's Complaint under four Ace policies. Additionally, Groundwater Technologies, Inc., Fluor Daniel's successor in interest, was covered under seven Ace, d/b/a and/or successor in interest, National Union Fire Insurance Company ("National Union") policies. Comp. ¶¶ 14 - 16. The City is asserting its rights as a named additional insured, and other residual rights the City may have directly against Ace. Comp. ¶¶ 17, 27. In or about March 2004, the City made a claim for coverage under the aforementioned policies. To date, Ace has not responded. Comp. ¶ 18. The City has submitted a claim against Fluor Daniel to the claims process in Fluor Daniel's reorganization proceedings. Comp. ¶ 27.

II. STANDARDS

Defendant seeks to dismiss this case under both Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief may be granted. When ruling on a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations in the complaint and the inferences reasonably drawn from them. *See Baxter by Baxter v. Vigo County Sch. Corp*., 26 F.3d 728, 730 (7th Cir. 1994). In essence, the standard for a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is the same as the standard for a 12(b)(6) motion to dismiss. *See Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995). Dismissal is appropriate only if it appears beyond doubt that Plaintiff can prove no set of facts consistent with the allegations in the complaint that would entitle it to relief. *See Hi-Lite Prods. Co. v. Am. Home Prods. Corp*., 11 F.3d 1402, 1405 (7th Cir. 1993). This standard means that if any set of facts, even hypothesized facts, could be proven consistent with the complaint, then the complaint must not be dismissed. *See Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc*., 40 F.3d 247, 251 (7th Cir. 1995).

Further, Plaintiff is "not required to plead the particulars of [its] claim[s]," *Hammes v. AAMCO Transmissions, Inc*., 33 F.3d 774 (7th Cir. 1994), except in cases alleging fraud or mistake where plaintiffs must plead the circumstances constituting such fraud or mistake with particularity. *See* Fed. R. Civ. P. 9(b); *Hammes*, 33 F.3d at 778. "Particularity" requires plaintiffs to plead the who, what, when, where, and how of the alleged fraud. *See Ackerman v. N.W. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990). Finally, the Court need not ignore facts set out in the complaint that undermine Plaintiff's claims, *see Homeyer v. Stanley Tulchin Assoc*., 91 F.3d 959, 961 (7th Cir. 1996) (*citing Am. Nurses' Ass'n v. State of Illinois*, 783 F.2d 716,

724 (7th Cir. 1986)), nor is the Court required to accept Plaintiff's legal conclusions. *See Reed v.. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996); *Gray v. Dane County*, 854 F.2d 179, 182 (7th Cir. 1988).

III. DISCUSSION

12(b)(1) - SUBJECT MATTER JURISDICTION

Ace moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), contending that the Court lacks subject matter over the City's action because no "actual controversy" is presented pursuant to the Declaratory Judgment Act. Def.'s Mot. at 2 (*citing* 28 U.S.C. § 2201(a)). Ace argues that the City's claim is an indemnity claim with respect to the underlying action that is not ripe for adjudication. Def.'s Mot. at 2. The Declaratory Judgment Act, under which the City brought this suit, states: "In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration."[1] 28 U.S.C. § 2201(a). When determining whether an actual controversy exists, the question is whether there is a controversy between parties with adverse legal interests "of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *In re VMS Sec. Litig.*, 103 F.3d 1317, 1327 (7th Cir. 1996) (*quoting Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

The Court must determine whether or not there is a ripe controversy regarding Ace's duty to

[1] The City, in its complaint, claims entitlement to declaratory relief pursuant to the Indiana Declaratory Judgments Act. *See* Ind. Code 34-14-1-1 *et seq*. However, sitting in diversity, the Court applies state substantive law and federal procedural law. *See Musser v. Gentiva Health Servs.*, 356 F.3d 751, 754 (7th Cir. 2004).

indemnify Fluor Daniel for any eventual losses it may suffer in the underlying action. As a general rule, "decisions about indemnity should be postponed until the underlying liability has been established." *Lear Corp. v. Johnson Elec. Holdings Ltd.*, 353 F.3d 580, 583 (7th Cir. 2003). *See also Nationwide Ins. v. Zavalis*, 52 F.3d 689, 693 (7th Cir. 1995); *Grinnell Mut. Reins. Co. v. Reinke*, 43 F.3d 1152, 1154 (7th Cir. 1995).[2] This rule is in place because a declaration regarding the duty to indemnify may have no real-world impact if no liability arises in the underlying litigation. *See Lear*, 353 F.3d at 583. The declaration could, therefore, amount to an impermissible advisory opinion. *Id*. Such declarations also are ill-advised because they "consume judicial time in order to produce a decision that may turn out to be irrelevant." *Id*.

In *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 680 (7th Cir. 1992), the Seventh Circuit considered the following factors to determine whether the duty to indemnify claim was ripe: the likelihood that the insured would be liable in the underlying litigation; the high amount of damages for which the insured was likely to be liable; the insured's inability to pay those damages if found liable; the likelihood that no other insurance policy would cover the damages. *Id*. at 681-82. The court noted that whether a probabilistic injury is sufficient to state a claim is a "matter of degree." *Id*. at 681. Because the court found a high likelihood that the insured would be held liable in the underlying action for an amount that the insured could not afford to cover, the Seventh Circuit found that the harm was sufficiently probable to allow a declaratory judgment on the duty to indemnify before the question of the insured's liability was resolved.

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[2] The City claims the authority cited by Ace actually turns on Illinois state law regarding direct actions against insurers. The Court finds this argument unpersuasive. To the contrary, the authority cited involves the Seventh Circuit's interpretation of the "case or controversy" jurisdictional requirement of 28 U.S.C. § 2201.

Id.

In this case, the general rule against issuing a declaratory judgment regarding Ace's duty to indemnify Fluor Daniel before the underlying action is resolved is appropriate. If the Court were to issue a declaratory judgment in the City's favor regarding the duty to indemnify, and the City does not prevail on any of its claims, the Court's declaratory judgment would be entirely irrelevant. The Court has no basis on which to evaluate the likelihood of Ace's liability in the underlying action, the level of liability likely to be incurred, or Fluor Daniel's ability to pay any possible damages in the underlying action. In particular, all of the insurance policies at issue have not been produced by the parties and the Court is unable to determine whether coverage exists, let alone the extent of coverage. This case has not presented an "actual controversy" between the parties, thereby depriving the Court of subject matter jurisdiction. As it pertains to the City's request for a declaratory judgment regarding the duty to indemnify, Ace's motion to dismiss is **GRANTED** and the cause is dismissed without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's, Ace Insurance Company of North America, Motion to Dismiss, and the cause is dismissed without prejudice.

IT IS SO ORDERED this 20th day of September, 2004.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution attached.
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